

FACTUAL HISTORY

On March 18, 2009 appellant, then a 44-year-old mail carrier, filed an occupational disease claim alleging low back pain and numbness in his right leg due to performing the repetitive duties of his job. He stated that he first became aware of his claimed condition in May 2007 and that he first realized in December 2008 that it was caused or aggravated by his work. Appellant stopped work on February 13, 2009.

Appellant submitted numerous medical reports in support of his occupational disease claim including reports of Dr. Praveen V. Mummaneni, an attending Board-certified neurosurgeon, and Dr. Nirbhai Hundal, an attending Board-certified internist. In a May 14, 2009 decision, OWCP denied appellant's claim for back and leg conditions because the reports he submitted lacked a rationalized medical opinion that those conditions were related to specific work factors.

In decisions dated April 8, 2010, July 7, 2011, and September 14, 2012, OWCP denied modification of its denial of appellant's claim for a work-related occupational disease claim. It continued to indicate that the reports submitted by appellant did not contain a rationalized medical opinion that his back and leg conditions were related to specific work factors. In a June 1, 2011 report, Dr. Alice Martinson, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant's history and physical findings did not suggest that his back complaints were work related. Dr. Martinson stated that appellant's back complaints developed after a nonwork-related surgical procedure.

In a form dated September 10, 2013 and received on September 17, 2013, appellant requested reconsideration of his claim. In an accompanying September 10, 2013 letter received on September 17, 2013, he again requested reconsideration of OWCP's September 14, 2012 decision. Appellant indicated that Dr. Martinson's report "changed to her estimation" and he noted that he "never mention that [sic] was a job accident."

In support of his reconsideration request, appellant submitted numerous reports, dated April 2009 to February 2012, the vast majority of which had previously been submitted and considered by OWCP. In several reports, Dr. Mummaneni, an attending Board-certified neurosurgeon, stated that appellant's L5-S1 degenerative disc arthritis "certainly could have been contributed to" by his work at the employing establishment doing heavy lifting and bending over the past 15 years. In other reports, Dr. Hundal, an attending Board-certified internist, stated that appellant's back condition was likely caused by repetitive bending and lifting at work. In a report with an illegible date, Dr. Hundal stated that appellant's repetitious bending, lifting, and twisting likely caused his symptoms of right lower extremity symptoms.³

In a September 19, 2013 decision, OWCP denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant's reconsideration request was filed on September 17, 2012, more than one year after OWCP's September 14, 2012 merit decision. OWCP found that, therefore, appellant had to demonstrate clear evidence of error on the part of

³ It appears that this note had not been previously submitted to OWCP.

OWCP in issuing this decision. It determined that the evidence submitted by appellant did not show such clear evidence of error.⁴

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, OWCP must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”⁷ OWCP regulations and procedure provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of OWCP.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁹ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by OWCP of how the

⁴ OWCP stated, “The basis for this decision is that, with the exception of the undated note from Dr. Hundal all of the other medical reports that you submitted were already on file. The brief note of Dr. Hundal is not sufficient to show clear evidence of error in the original decisions in your case.”

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedure further provides, “The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.”

⁹ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

¹⁰ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹¹ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹² *See Leona N. Travis*, *supra* note 10.

evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹³

ANALYSIS

The Board finds that OWCP properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed on September 17, 2012,¹⁴ more than one year after OWCP's September 14, 2012 decision, and therefore he must demonstrate clear evidence of error on the part of OWCP in issuing this decision.

The Board also finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its September 14, 2012 decision. He had not submitted the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.

In support of his reconsideration request, appellant submitted numerous reports dated between April 2009 and February 2012, the vast majority of which had previously been submitted and considered by OWCP. In several reports, Dr. Mummaneni, an attending Board-certified neurosurgeon, stated that appellant's L5-S1 degenerative disc arthritis "certainly could have been contributed to" by his work at the employing establishment doing heavy lifting and bending over the past 15 years. Dr. Hundal, an attending Board-certified internist, stated in several reports that appellant's back condition was likely caused by repetitive bending and lifting at work. In another report, Dr. Hundal stated that appellant's repetitious bending, lifting, and twisting likely caused his symptoms of right lower extremity symptoms. These reports contain vague and equivocal opinions on the cause of appellant's back and leg conditions. OWCP has already determined that these and similar reports were not sufficiently well rationalized to show that appellant sustained a work-related occupational condition. Therefore, they would not tend to show that OWCP erred in issuing its September 14, 2012 decision denying appellant's claim.

Before OWCP and on appeal, appellant suggested that although OWCP found the medical report of Dr. Martinson, a Board-certified orthopedic surgeon who served as an OWCP referral physician, to be the weight of evidence, it was improper because Dr. McCaffrey had challenged that report. Appellant did not explain how the evidence of record supported this argument and he did not clearly show that OWCP committed error in its September 14, 2012 decision with respect to its evaluation of Dr. Martinson's medical opinion.¹⁵

¹³ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹⁴ Appellant reconsideration request was received on September 17, 2013 and therefore was considered to have been filed on September 17, 2013. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

¹⁵ In a September 10, 2013 letter received on September 17, 2013, appellant indicated that Dr. Martinson's report "changed to her estimation" and he noted that he "never mention that [sic] was a job accident." It is unclear what appellant meant to express in these statements.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's September 14, 2012 decision. OWCP properly determined that appellant did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board